IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff, vs. TYSON FOODS, INC., *et al.* Defendants.	Case No. 05-CV-0329-GKF-PJC

DEFENDANTS' JOINT RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO SERVE A SUPPLEMENTAL EXPERT REPORT BY DRS. COOKE/WELCH (DKT. # 1826), AND INTEGRATED BRIEF IN SUPPORT THEREOF

EXPEDITED CONSIDERATION REQUESTED

COME NOW Defendants, and for their Joint Response to Plaintiffs' Motion for Leave to Serve a Supplemental Expert Report by Drs. Cooke/Welch (Dkt. #1826), state as follows:

I. INTRODUCTION

Plaintiffs' expert reports were originally due on December 3, 2007. See Scheduling Order, Dkt. #1075 (Mar. 9, 2007). In October 2007, the Court granted the Plaintiffs an across-the-board delay until April 2008 for expert reports on all issues other than damages. Amended Scheduling Order, Dkt. #1376 (November 15, 2007). In March 2008, Plaintiffs again sought and were granted a further extension of their non-damages expert reports until May 2008, Opinion and Order, Dkt. No. 1658 (Mar. 27, 2008), and then secured yet another extension for a subset of non-damages experts, Opinion and Order, Dkt. No. 1706 (May 15, 2008).

As the Court is aware, thereafter the Plaintiffs failed to produce working copies of the computer models upon which a number of their experts relied, and many of Plaintiffs' experts served lengthy "errata" reports. Opinion and Order, Dkt. No. 1756 (Aug. 8, 2008) and No. 1787 (Oct. 28, 2008). The aggregation of Plaintiffs' delays has required defense experts to revisit work already completed, in some cases to re-start their work from scratch, and generally impeded Defendants' ability to prepare their case. *See* Defendants' Motion to Enforce Scheduling Order at Dkt. No. 1759. These multiple late submissions, Magistrate Judge Joyner noted, were "extremely unfortunate" as they were "detrimental to the timely resolution of this case" and "force[d] the Court to extend the date Defendants' expert reports are due." Opinion and Order, Dkt. No. 1787 (Oct. 28, 2008).

Unfortunately, this type of activity is continuing, as evidenced by the Plaintiffs' recent Motion to file rebuttal expert reports (Dkt. # 1819) and by way of the subject Motion (Dkt. #1826). During the deposition of Dr. Dennis Cooke, Dr. Cooke alerted Defendants' counsel that he had prepared a draft of some supplemental opinions regarding 2008 sampling data that he had reviewed well-beyond the already extended Plaintiffs' expert disclosure deadline.[1] Plaintiffs state in their Motion (Dkt #1826) that the Scheduling Order is "silent" on the issue of supplemental reports; however, Magistrate Judge Joyner's Opinion and Order of October 28, 2007 regarding the Scheduling Order and distinguishing between errata to correct a report and

[1] During the December 5, 2008 deposition of Dennis Cooke, PhD, Dr. Cooke provided Defendants' counsel with 20 pages of an unsigned, draft supplemental report dated November 25, 2007 incorporating supplemental sampling data from June-Sept, 2008. (See Cooke and Welch's Supplemental Report as provided to Defendants' counsel during said deposition, attached hereto as Exhibit A). This draft had handwritten comments on it that made it unclear if it was in final form or whether the State actually intended to use it, and it was only during a telephonic meet and confer on January 12, 2009 that Defendants were made aware of Plaintiffs' definitive intent to submit a supplement, which was submitted in final, signed form only with the subject Motion. However, in anticipation of the Court's refusal to allow supplements that bolster an expert's opinion, Defendants' counsel have sequestered both the draft and final versions of this document to date and have not provided it to the defense experts.

supplementation to bolster an expert report, certainly is not silent on the issue, and in fact is rather explicit in saying that late reports would only be permitted to the extent they corrected errors in the experts' previously submitted work. Opinion and Order, Dkt. 1787 (Oct. 28, 2008). In keeping with Magistrate Judge Joyner's Order, any supplemental report of Drs. Cooke and Welch should be stricken because simply adding consideration of 2008 data to the report by way of a supplement is clearly intended to bolster, not correct, the original report. Admission of this supplement would force the Defendants to consider new opinions and new data that have been in the Plaintiffs' possession for at least four months on the eve of submission of the Defendants' corresponding expert reports due on January 30, 2009.

The fact that the Plaintiffs only sought leave to submit such a supplemental report a mere eight business days prior to the deadline for Defendants' corresponding expert reports which will rebut the opinions of Drs. Cooke and Welch only further demonstrates the soundness of Magistrate Judge Joyner's concerns about supplementation expressed in the referenced Order, and demonstrates why this Court and other courts in the Tenth Circuit have refused to allow supplemental bolstering reports. Such reports would render the Court's scheduling orders meaningless and result in unfairness and inequity to the Defendants. Accordingly, Defendants respectfully request that the Court consider this motion on an expedited basis due to the imminent deadline for Defendants' expert reports responding to the report of Drs. Cooke and Welch, and deny said Motion by striking the proposed supplement by Drs. Cooke and Welch.

II. LEGAL STANDARD

Courts faced with the decision whether or not to admit supplemental expert reports first consider Fed.R.Civ.P. 26(e), which provides, in pertinent part:

> (1) In General. A party who has made a disclosure under Rule 26(a) – or who has responded to an interrogatory, request for production, or request for admission – or who has responded to an interrogatory, request for production, or request for admission – must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing[.] . . .
>
> (2) Expert Witness. For an expert whose report must be disclosed under Rule 26 (a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

While an affirmative duty to correct errors in expert reports exists, this duty does not extend beyond correcting or completing errors in original reports (see discussion below).

III. DISCUSSION

As the Court noted in the Opinion and Order regarding Enforcement of the Scheduling Order, "the right to supplement under Rule 26(e) is not without limits." Opinion and Order, Dkt. 1787 (Oct. 28, 2008). Further, this Court specifically addressed the exact issue of whether or not to admit supplemental reports that merely bolster an expert's opinions in *Cohlmia v. Ardent Health Servs., LLC*, 2008 WL 3992148 (N.D. Okla. Aug. 22, 2008), citing to an earlier decision in *Palmer et. al., v. Asarco, et. al.*,

2007 WL 2254343 (N.D. Okla. Aug. 3, 2007) (quoting *Cook v. Rockwell Int'l Corp*., 580 F.Supp.2d (D. Colo. 2006) and stated:

> A supplemental expert report that states ***additional*** opinions or rationales or seeks to "***strengthen***" or "***deepen***" opinions expressed in the original expert report ***exceeds the bounds of permissible supplementation*** and is subject to exclusion under Rule 37(c)(1). To rule otherwise would create a system where preliminary [expert] reports could be followed by supplementary reports and there would be no finality to expert reports, as each side, in order to buttress its case or position, could "supplement" existing reports and modify opinions previously given. This result would be the antithesis of the full expert disclosure requirements stated in Rule 26(a). (Emphasis added).

In his deposition testimony, Dr. Cooke clearly stated that the new report supplements his original report and does not correct his earlier work. (See excerpts of Deposition of G.D. Cooke, taken on December 4 and 5, attached hereto as Exhibit B).

Further, in the above mentioned Opinion and Order, this Court noted that Rule 26(e) "allows supplementation of expert reports ***only*** where a disclosing party learns that its information is incorrect or incomplete." (Emphasis added). (citing *Quarles v. United States*, 2006 U.S. Dist. LEXIS 96392 (N.D. Okla. Dec 5, 2006)). Opinion and Order, Dkt. 1787 (Oct. 28, 2008). The court in *Quarles* struck additional testing by the plaintiff's expert to bolster opinions after submission of the original expert report, relying on *Akeva v. Mizuno*, 212 F.R.D. 306, 310 (M.D.N.C. 2002), noting:

> Rule 26(e) envisions supplementation when a party's discovery disclosures happen to be defective in some way so that the disclosure was incorrect or incomplete and, therefore, misleading. It does not cover failures of omission because the expert did an inadequate or incomplete preparation. To construe supplementation to apply whenever a party wants to bolster or submit additional expert opinions would [wreak] havoc in docket control and amount to unlimited expert opinion preparation.

As the court in *Akeva* foretold, unlimited supplemental testing and reporting by experts would result in moving targets for opposing parties and prohibit the timely resolution of cases relying upon expert testimony. Additional Tenth Circuit case law surrounding this specific issue confirms the findings in *Akeva*, *Cohlmia*, *Quarles*, and *Palmer*. For example, the court in *Leviton Mfg. Co., Inc. v. Nicor, Inc.*, 245 F.R.D. 524, 528, 531 (D.N.M. 2007) found that a supplemental report should not be allowed when the supplement was not offered to correct information in the original report, nor should it be admitted to "deepen" or "strengthen" an expert's prior report. *See also, e.g., Cook v. Rockwell Int'l Corp.*, 580 F.Supp.2d (D. Colo. 2006); *Beller v. United States*, 221 F.R.D. 689 (D.N.M. 2005).

A review of the Cooke and Welch supplement confirms that the Plaintiffs are only attempting to bolster or deepen the opinions originally expressed by Drs. Cooke and Welch in their initial report. Drs. Cooke and Welch unequivocally expressed this intention in the very first sentence of the draft report supplied to the Defendants, stating, "This supplement to the above named report summarizes new data collected in 2008." (Ex. A). Moreover, Dr. Cooke admitted under oath at his deposition that his supplemental report merely "conform[s] to our understanding of how reservoirs work," and described his actions as "getting more data" and the supplement itself as merely containing "new data for 2008," which in no way corrects the original report. (Ex. B).

Plaintiffs also contend that this issue is a matter of "fundamental fairness" to allow Drs. Cooke and Welch to supplement their report because certain defense experts have until May 2009 to submit their reports. This argument is fundamentally flawed. First, only one defense expert, James Chadwick, has been provided until May 2009 to

complete his report, while all of the remainder of Defendants' expert reports are due before the end of January, 2009. *See* Opinion and Order, Dkt. 1756 (Oct. 8, 2008). Second, Dr. Chadwick's deadline is only applicable to a final portion of his report; the remainder, and great majority, of his report is due on January 30, 2009 – a mere eight business days after Plaintiffs' filing of this motion. *See* Opinion and Order, Dkt. 1756 (Oct. 8, 2008). Importantly, Dr. Chadwick is not even collecting water quality data for Lake Tenkiller, but is instead obtaining seasonal macroinvertebrate data. The Plaintiffs had asserted that spring sampling was a critical sampling time and the reports to which Dr. Chadwick was responding were not received until after the spring sampling opportunities had passed. Thus, the Court allowed Dr. Chadwick an opportunity to sample in the spring of 2009 and report on it. This activity does not relate to the work of Drs. Cooke and Welch in their initial report or to their proposed supplement, and so one has nothing to do with the other. Perhaps most importantly is that the Defendants sought and received the Court's advance permission under the scheduling order for Dr. Chadwick to conduct his spring sampling. The Defendants did not presume to do the sampling and write the report, and then further assume that the Court would allow its use after the fact by way of supplementation.

Magistrate Judge Joyner already considered the "fundamental fairness" of the various competing interests on this point and issued the Scheduling Order accordingly, but the State would have the Court waste judicial resources and the Defendants' resources by re-litigating the issue. Plaintiffs' experts have been afforded ample time to sample, analyze, and report on data they collected in the Illinois River Watershed from 2005 to 2007, beginning even before the Defendants were sued in this case. The Plaintiffs

know this and so resort to ill-defined equitable arguments to support a proposition for outright bolstering of their report with newly collected data after the court-scheduled deadline – a proposition that has been firmly rejected time and again by this Court and others in the Tenth Circuit and elsewhere. *See Cohlmia v. Ardent Health Servs., LLC*, 2008 WL 3992148 (N.D. Okla. Aug. 22, 2008); *Palmer et. al., v. Asarco, et. al.*, 2007 WL 2254343 (N.D. Okla. Aug. 3, 2007); *Quarles v. United States*, 2006 U.S. Dist. LEXIS 96392 (N.D. Okla. Dec 5, 2006); *Leviton Mfg. Co., Inc. v. Nicor, Inc.*, 245 F.R.D. 524 (D.N.M. 2007); *Cook v. Rockwell Int'l Corp.*, 580 F.Supp.2d (D. Colo. 2006); *Beller v. United States*, 221 F.R.D. 689 (D.N.M. 2005); *Akeva v. Mizuno*, 212 F.R.D. 306, 310 (M.D.N.C. 2002).

In truth, Plaintiffs lost the ability to claim an equitable argument by filing this motion on January 21, 2009—equity aids the vigilant, not the negligent. According to the supplemental report, the sampling began on June 3, 2008 and the final samples were taken on September 22, 2008. (Exhibit 2 to Plaintiff's Motion, Dkt # 1826). The Plaintiffs could have filed a motion for leave for a supplemental report any time during the past four months, or even earlier, since there was obviously an intent to consider new 2008 data when new sampling began in June, 2008, almost immediately after Drs. Cooke and Welch filed the first version of their report in May, 2007. Further, Plaintiffs were apparently well aware of this issue on October 8, 2008 when the parties were arguing the issue of whether Drs. Cooke and Welch could issue various errata to their report, but the Plaintiffs never bothered to mention "supplements" or to make any distinction between "errata" and "supplements" at that hearing. Moreover, the Plaintiffs knew at that time that the final draft of Dr. Chadwick's report was not due until May 2009 and made no attempt

to move for leave to file a supplemental report on equitable or any other grounds at that time.

Rather, the Plaintiffs lay in wait before springing on the Defendants a ten day old draft version of the Cooke-Welch supplement dated November 25, 2007 during the deposition of Dr. Cooke conducted on December 4-5, 2007. The Plaintiffs further waited until the eve of the January 30, 2009 deadline for the Defendants' corresponding expert reports to seek leave for submission of a signed and final version of the supplement that the Defendants were never provided until the subject Motion was filed on January 21, 2009. (See Ex. 2 to Motion, Dkt #1826)

Plaintiffs' failure to timely file this Motion negates any equitable argument in their favor. It would be inequitable for the Defendants to be expected to continue to deal with the changing opinions and newly considered, last minute data that the Plaintiffs continue to unfairly throw at the Defendants well beyond established deadlines in the case. What is inequitable is to allow the Plaintiffs to continue to treat the scheduling orders in this case as though they are just meaningless paper, and to allow the Plaintiffs to repeatedly require the Defendants to spend time re-arguing issues that have already been argued and decided. The equities, if they are to be considered, tilt decidedly in favor of enforcing the expert deadline which Magistrate Judge Joyner extended multiple times for Plaintiffs, before making clear that the very type of additional data and opinion that Plaintiffs now offer would no longer be permitted. The Plaintiffs know that the law prohibits this type of bolstering, and so it has concocted an equity argument as a way of attempting to circumvent the law.

Dr. Cooke has acknowledged this new report for what it is when, at his deposition, he described his actions as merely "getting more data" and the supplement itself as only containing "new data for 2008," which in no way corrects errors to the original report. (Ex. B). The Plaintiffs also attempt to justify the supplementation as a way to have the latest data available in the case. This proffered explanation leads to the expectation that the Plaintiffs would want to sample again in 2009 and use the same rationale to seek to supplement yet again just before trial. This would result in prejudice to the Defendants that cannot be cured merely by offering to pay for another round of depositions of the same witnesses. The proposed supplement is unquestionably prohibited supplementation which this Court has correctly confirmed as being disallowed for the very reason that it hinders resolution of the case and prejudices opposing parties. The Court should deny the Motion and strike the supplemental report.

IV. CONCLUSION

As the Plaintiffs concede in the introduction to their Motion, allowing Drs. Cooke and Welch to bolster their report in the described manner will ultimately result in further cost and delays in the preparation of defense expert reports, further costs to the Plaintiffs to gather and serve additional considered materials for Drs. Cooke and Welch, and further costs to both Plaintiffs and Defendants in re-deposing Drs. Cooke and Welch on their supplemental reports. This is a moving target for the Defendants. There is nothing efficient or expedient about the considerable amount of additional time and expense necessary for ***all*** parties if this supplemental report is allowed. Additionally, allowing a supplemental bolstering report by Drs. Cooke and Welch could open the door to additional supplemental expert reports by Plaintiffs' other experts—in turn requiring a

response by defense experts and additional depositions to cover the supplemental opinions on both sides, ultimately postponing resolution of this entire matter.

WHEREFORE, PREMISES CONSIDERED, the Defendants respectfully request that this Court deny Plaintiff's Motion Serve a Supplemental Expert Report by Drs. Cooke/Welch, that the Court Strike the said supplemental report, and further pray for any and all other relief to which they may be entitled.

Respectfully submitted,

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